Koperasi Permodalan Felda Malaysia Bhd v Imej Parking Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(NCVC)(W)-1190–07 OF 2023 AND B-02(NCVC)(W)-1191–07 OF 2023
SUPANG LIAN, LIM CHONG FONG AND AHMAD FAIRUZ JJCA
5 FEBRUARY 2025

Civil Procedure — Appeal — Appeal against decision of High Court — Car park management services — Claim for loss of profit — Whether car park management as occupier of premises required to obtain a mechanical parking license — Whether car park management could claim for refund of monthly rental fees due to alleged shortfall in physical occupancy — Whether owner of car park premises could counterclaim for set off sums — Whether appellate intervention warranted

Koperasi Permodalan Felda Malaysia Bhd ('Koperasi Felda') was the owner of a car park and Tower E at Southgate Commercial Centre ('the premises'). Imej Parking Sdn Bhd ('Image Parking') was a company that provided car park management services, including the supply and installation of automated car park systems. In July and August 2012, Image Parking submitted three business proposals to Koperasi Felda regarding the operation of the car park at the premises. Following these proposals, Koperasi Felda appointed Image Parking as the car park operator through a letter of award ('letter of award'). The appointment was for a period from 1 April 2013 until 31 March 2019 ('car park operation term'), during which Image Parking was responsible for managing the car park and paying monthly rental fees and profit sharing to Koperasi Felda. The car park operation term was extended twice and on 1 October 2019, Image Parking handed over the car park operation to Koperasi Felda. Following the handover, Image Parking initiated legal proceedings against Koperasi Felda claiming: (a) loss of profit from the mechanical parking operation due to Koperasi Felda's alleged failure to obtain a mechanical parking license; (b) refund of monthly rental fees due to alleged shortfall in physical occupancy rates at the premises; and (c) various declarations regarding Koperasi Felda's responsibilities under the agreement. The High Court partially allowed and dismissed the claims of both parties, resulting in a net balance payable by Koperasi Felda to Image Parking. Dissatisfied, Image Parking and Koperasi Felda filed separate appeals. Both appeals, Appeal No 1190 and Appeal No 1191, were against part of the High Court's decision which partially allowed and dismissed the claims of Image Parking and the counterclaim of Koperasi Felda. In Appeal No 1190, Koperasi Felda was the appellant and Image Parking was the respondent. Meanwhile, Image Parking

was the appellant and Koperasi Felda was the respondent in Appeal No 1191. During the hearing, Image Parking made a concession as to the error of the learned judge at the High Court.

Held, dismissing the Appeal No 1191:

(1) The HCJ correctly analysed what was due to Koperasi Felda. He had carefully found only one component of the counterclaim, specifically the amount of RM189,446.37 representing unpaid guaranteed rentals, profit sharing and GST had been proven. This amount was established through Image Parking's own admissions in their pleadings. The consequence of the acknowledgement would mean that Image Parking would have no amount to set off against its claims and would instead be liable to pay Koperasi Felda (see paras 15–16).

(2) As for Koperasi Felda's other counterclaims for set off, specifically RM66,991.37 as set off No 1, RM61,325.37 as set off No 2, and RM5,666 for GST, these must be dismissed. The HCJ correctly found that Koperasi Felda had failed to establish both the basis and quantum for these additional claims. As these were claims for special damages, they require specific proof which Koperasi Felda had not provided. Given that Image Parking conceded on the issue of the RM306,240 claim, Image Parking was required to pay Koperasi Felda the sum of RM189,446.37. There was no longer a need to set off. The remainder of the counterclaim was dismissed and the decision of the HCJ was affirmed (see paras 20–22).

(3) The HCJ had correctly found that: (a) Image Parking actually collected revenues from the mechanical parking bays at RM212 per bay per month even during periods without valid licensing; (b) 27 there was also no proof of actual loss of income due to the absence of licensing; and (c) even if loss of income had been proven (which it was not), Image Parking would only be entitled to 5% of such loss based on the profit-sharing formula in the contract, not the 100% claimed. This finding accurately reflected the clear terms of the agreement between the parties. The totality of evidence amply supported the HCJ's conclusion that no compensable loss of profits occurred during the unlicensed periods. There was no error in either the reasoning or the conclusion reached on this issue (see paras 25 & 31–32).

(4) On the issue of refund of monthly rental fees due to alleged shortfall in physical occupancy rates at the premises, Image Parking claimed for a refund amounting to RM1.26m being the sum due to them as the occupancy rates were below 80% during the contract period. The HCJ meticulously analysed the contractual provisions regarding occupancy rates and had correctly rejected the calculation method employed by Image Parking through Henry Butcher. The HCJ's rejection of the

unit-based calculation rested on three fundamental conclusions: it failed to account for significant size differences between units, it particularly undervalued Block E's contribution to occupancy given its substantially larger unit sizes, and most importantly, it was fundamentally unsuitable for determining actual physical occupancy for car park operation purposes (see paras 33, 40 & 50).

(5) The HCJ had correctly found that the claim for overpayment was an afterthought was based on several compelling factors, namely: (a) throughout 78 months of operations, Image Parking never raised the issue of occupancy rates or sought adjustments to rental payments; (b) the first claim for alleged overpayment emerged only after the contract's termination; (c) as an experienced car park operator, if there was genuine concern about occupancy rates affecting rental obligations, Image Parking would likely have raised this during the contract period rather than after its conclusion; and (d) Image Parking's conduct in July 2017 of proposing to pay a fixed monthly amount of RM160,000 irrespective of revenue collections was inconsistent with having concerns about occupancy rates affecting rental obligations. In the circumstances, there was no reason to disturb the factual analysis carried out by the trial court. The analysis was well reasoned and did not necessitate any appellate intervention (see paras 54–58).

(6) The primary responsibility for obtaining and maintaining the certificate of fitness under s 19 of the Act lay with Image Parking as the occupier. As the operator, Image Parking was also in a better position to answer to the authorities on the technical aspects of the equipment and would be able to provide information as and when an inspection is carried out. However, Koperasi Felda as the owner retained secondary liability under s 50(3) should they knowingly permit operation without proper certification. However, this was not an issue before the trial as there were no enforcement issues against any party at the trial court. In the circumstances, there was no reason to allow any reversal of the HCJ's finding on this issue (see paras 70–72).

[Bahasa Malaysia summary

Koperasi Permodalan Felda Malaysia Bhd ('Koperasi Felda') adalah pemilik tempat letak kereta dan Menara E di Pusat Komersial Southgate ('premis tersebut'). Imej Parking Sdn Bhd ('Image Parking') adalah sebuah syarikat yang menyediakan perkhidmatan pengurusan tempat letak kereta, termasuk pembekalan dan pemasangan sistem tempat letak kereta automatik. Pada Julai dan Ogos 2012, Image Parking telah mengemukakan tiga cadangan perniagaan kepada Koperasi Felda berhubung operasi tempat letak kereta di premis tersebut. Berikutan cadangan tersebut, Koperasi Felda melantik Image Parking sebagai pengendali tempat letak kereta melalui surat awad ('surat awad'). Pelantikan itu adalah untuk tempoh dari 1 April 2013 hingga 31 Mac

2019 ('tempoh operasi tempat letak kereta'), di mana Image Parking bertanggungjawab menguruskan tempat letak kereta dan membayar yuran sewa bulanan dan perkongsian keuntungan kepada Koperasi Felda. Tempoh operasi tempat letak kereta telah dilanjutkan sebanyak dua kali dan pada 1 Oktober 2019, Image Parking telah menyerahkan operasi tempat letak kereta kepada Koperasi Felda. Berikutan penyerahan itu, Image Parking memulakan prosiding undang-undang terhadap Koperasi Felda dengan mendakwa: (a) kehilangan keuntungan daripada operasi parkir mekanikal kerana Koperasi Felda yang didakwa gagal mendapatkan lesen parkir mekanikal; (b) pembayaran balik yuran sewa bulanan disebabkan dakwaan kekurangan dalam kadar pemenuhan fizikal di premis; dan (c) pelbagai pengisytiharan mengenai tanggungjawab Koperasi Felda di bawah perjanjian tersebut. Mahkamah Tinggi sebahagiannya membenarkan dan menolak tuntutan kedua-dua pihak, menyebabkan baki bersih yang perlu dibayar oleh Koperasi Felda kepada Image Parking. Tidak berpuas hati, Image Parking dan Koperasi Felda memfailkan rayuan berasingan. Kedua-dua rayuan, Rayuan No 1190 dan Rayuan No 1191, adalah terhadap sebahagian daripada keputusan Mahkamah Tinggi yang sebahagiannya membenarkan dan menolak tuntutan Image Parking dan tuntutan balas Koperasi Felda. Dalam Rayuan No 1190, Koperasi Felda adalah perayu dan Image Parking adalah responden. Sementara itu, Image Parking adalah perayu dan Koperasi Felda adalah responden dalam Rayuan No 1191. Semasa perbicaraan, Image Parking membuat konsesi terhadap kekhilafan hakim yang bijaksana di Mahkamah Tinggi.

Diputuskan, menolak Rayuan No 1191:

(1) Hakim Mahkamah Tinggi telah menganalisis dengan betul apa yang perlu dilakukan oleh Koperasi Felda. Beliau dengan teliti mendapati hanya satu komponen tuntutan balas, khususnya jumlah RM189,446.37 yang mewakili sewa terjamin yang belum dibayar, perkongsian keuntungan dan GST telah dibuktikan. Jumlah ini telah dibuktikan melalui pengakuan Image Parking sendiri dalam pliding mereka. Akibat daripada pengakuan itu bermakna Image Parking tidak mempunyai jumlah untuk menolak tuntutannya dan sebaliknya akan bertanggungjawab untuk membayar Koperasi Felda (lihat perenggan 15–16).

(2) Bagi tuntutan balas Koperasi Felda yang lain untuk penolakan, khususnya RM66,991.37 sebagai penolakan No 1, RM61,325.37 sebagai No 2, dan RM5,666 untuk GST, ini mesti diketepikan. Hakim Mahkamah Tinggi dengan betul mendapati bahawa Koperasi Felda telah gagal mewujudkan asas dan kuantum untuk tuntutan tambahan ini. Oleh kerana ini adalah tuntutan ganti rugi khas, ia memerlukan bukti khusus yang tidak diberikan oleh Koperasi Felda. Memandangkan Image Parking mengakui dalam isu tuntutan RM306,240, Image Parking dikehendaki membayar Koperasi Felda sejumlah RM189,446.37. Tidak

ada lagi keperluan untuk menolak. Baki tuntutan balas telah ditolak dan keputusan hakim Mahkamah Tinggi telah dikekalkan (lihat perenggan 20–22).

(3) Hakim Mahkamah Tinggi telah memutuskan dengan betul bahawa: (a) Image Parking sebenarnya mengutip hasil daripada tempat letak kereta mekanikal pada RM212 setiap petak sebulan walaupun dalam tempoh tanpa pelesenan yang sah; (b) 27 juga tiada bukti kehilangan pendapatan sebenar akibat ketiadaan pelesenan; dan (c) walaupun kehilangan pendapatan telah dibuktikan (yang sebenarnya tidak), Image Parking hanya layak mendapat 5% daripada kerugian tersebut berdasarkan formula perkongsian untung dalam kontrak, bukan 100% yang dituntut. Dapatan ini dengan tepat mencerminkan terma perjanjian yang jelas antara pihak. Keseluruhan keterangan menyokong kesimpulan hakim Mahkamah Tinggi bahawa tiada kerugian keuntungan yang boleh dikompensasikan berlaku dalam tempoh tidak berlesen. Tiada kesilapan sama ada dalam alasan atau kesimpulan yang dicapai mengenai isu ini (lihat perenggan 25 & 31–32).

(4) Mengenai isu pemulangan bayaran sewa bulanan disebabkan dakwaan kekurangan dalam kadar pemenuhan fizikal di Premis, Image Parking menuntut bayaran balik berjumlah RM1.26 juta sebagai jumlah yang perlu dibayar kepada mereka kerana kadar pemenuhan adalah di bawah 80% dalam tempoh kontrak. Hakim Mahkamah Tinggi menganalisis dengan teliti peruntukan kontrak mengenai kadar pemenuhan dan telah menolak kaedah pengiraan yang digunakan oleh Image Parking melalui Henry Butcher dengan betul. Penolakan hakim Mahkamah Tinggi terhadap pengiraan berasaskan unit bersandarkan kepada tiga kesimpulan asas: ia gagal mengambil kira perbezaan saiz yang ketara antara unit, ia terutamanya mengira rendah sumbangan Blok E kepada pemenuhan memandangkan saiz unitnya yang jauh lebih besar, dan yang paling penting, ia pada asasnya tidak sesuai untuk menentukan pemenuhan fizikal sebenar untuk tujuan operasi tempat letak kereta (lihat perenggan 33, 40 & 50).

(5) Hakim Mahkamah Tinggi telah memutuskan dengan betul bahawa tuntutan untuk lebihan bayaran adalah pemikiran semula berdasarkan beberapa faktor yang memaksa, iaitu: (a) sepanjang 78 bulan operasi, Image Parking tidak pernah membangkitkan isu kadar pemenuhan atau meminta pelarasan kepada bayaran sewa; (b) tuntutan pertama untuk dakwaan lebihan bayaran muncul hanya selepas penamatan kontrak; (c) sebagai pengendali tempat letak kereta yang berpengalaman, jika terdapat kebimbangan yang tulus tentang kadar pemenuhan yang menjejaskan kewajipan sewa, Image Parking berkemungkinan akan menaikkannya semasa tempoh kontrak dan bukannya selepas tamatnya; dan (d) Kelakuan Image Parking pada Julai 2017 yang mencadangkan

untuk membayar jumlah tetap bulanan sebanyak RM160,000 tanpa mengira kutipan hasil adalah tidak konsisten dengan kebimbangan mengenai kadar penghunian yang menjejaskan kewajipan sewa. Dalam keadaan itu, tiada sebab untuk mengganggu analisis fakta yang dijalankan oleh mahkamah perbicaraan. Analisis ini mempunyai alasan yang baik dan tidak memerlukan sebarang campur tangan rayuan (lihat perenggan 54–58).

(6) Tanggungjawab utama untuk mendapatkan dan mengekalkan sijil kelayakan di bawah s 19 Akta terletak pada Image Parking sebagai penghuni. Sebagai pengendali, Image Parking juga berada dalam kedudukan yang lebih baik untuk menjawab kepada pihak berkuasa mengenai aspek teknikal peralatan dan akan dapat memberikan maklumat apabila pemeriksaan dijalankan. Walau bagaimanapun, Koperasi Felda sebagai pemilik mengekalkan liabiliti sekunder di bawah s 50(3) sekiranya mereka dengan sengaja membenarkan operasi tanpa perakuan yang sewajarnya. Bagaimanapun, ini bukan isu sebelum perbicaraan kerana tiada isu penguatkuasaan terhadap mana-mana pihak di mahkamah perbicaraan. Dalam keadaan tersebut, tiada sebab untuk membenarkan sebarang pembalikan penemuan hakim Mahkamah Tinggi mengenai isu ini (lihat perenggan 70–72).]

Cases referred to

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (folld)

Legislation referred to

Factories and Machinery Act 1967 ss 3, 19, 19(1), 21, 40(3), 50(1), (3)
Factories and Machinery (Notification, Certification of Fitness and Inspection) Regulations 1970 reg 10

Appeal from: *Imej Parking Sdn Bhd v Koperasi Permodalan Felda Malaysia Bhd* [2023] MLJU 1832 (High Court, Shah Alam)

Alif Ridhwan bin Mohd Yusof (Mohamad Izzuddin bin Jamalludin with him) (Hisham Sobri & Kadir) for the appellant.
Mohaji bin Selamat (Mohaji Hazury & Ismail) for the respondent.

Ahmad Fairuz JCA:

INTRODUCTION

[1] Imej Parking Sdn Bhd ('Image Parking') and Koperasi Permodalan Felda Malaysia Bhd ('Koperasi Felda') filed separate appeals to this court.

[2] Both Appeal B-02(NCvC)(W)-1190–07 of 2023 ('Appeal No 1190') and Appeal No B-02(NCvC)(W)-1191–07 of 2023 ('Appeal No 1191') are against part of the High Court's decision issued on 26 June 2023, which partially allowed and dismissed the claims of Image Parking and the counterclaim of Koperasi Felda.

[3] In Appeal No 1190, Koperasi Felda is the appellant and Image Parking is the respondent. Meanwhile, Image Parking is the appellant and Koperasi Felda is the respondent in Appeal No 1191.

[4] At the conclusion of the appeal, the appeal by Koperasi Felda was allowed while Image Parking's appeal was dismissed.

DECISION OF THE HIGH COURT

[5] The High Court ordered as follows:

(a) Image Parking's claim in respect of mechanical parking bays is allowed in the sum of RM306,240 only;

(b) all the other claims of Image Parking are dismissed;

(c) Koperasi Felda's counterclaims in respect of unpaid rental, share of profit and GST are allowed in the total sum of RM189,446.37 only;

(d) the other counterclaims of Koperasi Felda are dismissed;

(e) after mutual set off between the amounts in items (a) and (c) above, Koperasi Felda shall pay a net balance sum of RM116,793.63 to Image Parking;

(f) the net balance sum of RM116,793.63 carries interests at the rate of 5%pa from the date of filing the writ (ie 10 June 2020) until the date of full realisation; and

(g) Koperasi Felda shall pay costs of action in the sum of RM40,000, subject to allocator, to Image Parking.

BACKGROUND FACTS

[6] Koperasi Felda is the owner of a car park and Tower E at Southgate Commercial Centre ('the premises'). Image Parking is a company that provides car park management services, including the supply and installation of automated car park systems.

[7] In July and August 2012, Image Parking submitted three business proposals to Koperasi Felda regarding the operation of the car park at the Premises. Following these proposals, Koperasi Felda appointed Image Parking

as the car park operator through a letter of award dated 27 September 2012 ('letter of award'). The appointment was for a period from 1 April 2013 until 31 March 2019 ('car park operation term'), during which Image Parking was responsible for managing the car park and paying monthly rental fees and profit sharing to Koperasi Felda.

[8] Subsequently, on 3 November 2014, Image Parking prepared and submitted to Koperasi Felda a draft parking management agreement ('draft parking management agreement') which contained more detailed terms but was essentially consistent with the letter of award. Though Koperasi Felda did not execute this draft agreement, the parties conducted themselves according to its terms. From the facts, the main document used by the parties was the letter of award. For purposes of reference in this grounds of judgment, it shall also be referred as the 'carpark contract'.

[9] The car park operation term was extended twice: first from 1 April 2019 until 30 June 2019 ('first extension'), and then from 1 July 2019 until 30 September 2019 ('second extension'). Image Parking handed over the car park operation to Koperasi Felda on 1 October 2019.

[10] Following the handover, Image Parking initiated legal proceedings against Koperasi Felda claiming:

(a) loss of profit from the mechanical parking operation due to Koperasi Felda's alleged failure to obtain a mechanical parking license;

(b) refund of monthly rental fees due to alleged shortfall in physical occupancy rates at the premises; and

(c) various declarations regarding Koperasi Felda's responsibilities under the agreement.

[11] The High Court partially allowed and dismissed the claims of both parties, resulting in a net balance payable by Koperasi Felda to Image Parking.

APPEAL NO 1190

[12] Having considered the evidence and submissions, we find that Appeal No 1190 should be allowed for the following reasons:

Admission of error

[13] A significant factor in this determination is that during the hearing, Image Parking's solicitors made a concession as to the error of the learned judge at the High Court.

[14] In the submissions of Image Parking, the following acknowledgment was made:

> Pada pendengaran di Mahkamah Rayuan di hadapan Panel Hakim Mahkamah Rayuan iaitu YA Datuk Supang Lian dan YA Dato' Lim Chong Fong serta YA Dato' Ahmad Fairuz bin Zainol Abidin tarikh 19.08.2024, peguamcara Perayu/Imej dalam rayuan 1191 dan menjadi Responden dalam rayuan 1190 *telah memaklumkan Mahkamah Mulia ini demi menjimatkan masa berharga Mahkamah di awal prosiding bahawa:*
>
> > a. Perintah MTSA bertarikh 26.6.2023 terhadap KPF/Responden iaitu bayaran *pampasan kehilangan pendapatan/kerugian kepada Perayu berjumlah RM306,240.00 yang dipersetujui KPF* melalui surat ditandatangani oleh CEO Responden tarikh 15.5.2017 [rujuk ms 60–61, Rekod Rayuan Bahagian C Jilid 1] atas formula RM120 x 88 parkir = RM10,560 sebulan dan darab 29 bulan iaitu tempoh yang ketiadaan Sijil Mesin Angkat bermula 1.4.2013 hingga 31.8.2015 *tersebut adalah 'khilaf' kerana pampasan kehilangan pendapatan/kerugian tersebut telah dibayar KPF kepada Imej Parking Sdn Bhd* melalui penolakan atau 'set off' tunggakan sewa yang berlaku akibat tersilap invois jumlah sewaan bulanan oleh KPF;

Impact on set off

[15] The consequence of the acknowledgement would mean that Image Parking would have no amount to set off against its claims and would instead be liable to pay Koperasi Felda. This follows logically from the admission by Image Parking.

Set off calculation correctly made by the learned judge

[16] It is our view that the learned judge correctly analysed what was due to Koperasi Felda. He had carefully found only one component of the counterclaim, specifically the amount of RM189,446.37 representing unpaid guaranteed rentals, profit sharing and GST had been proven. This amount was established through Image Parking's own admissions in their pleadings.

[17] It was highlighted that in items 2, 3 and 4 of para 57 of the amended statement of claim, Image Parking has expressly acknowledged the following unpaid amounts:

(a) RM70,000 as guaranteed rental for September 2019;

(b) RM112,432.50 as 95% profit sharing for August 2019; and

(c) RM7,013.87 as 95% profit sharing for September 2019.

[18] These admissions were further reinforced in para 14 of Image Parking's reply to defence and defence to counterclaim. While PW1 Anuar bin Ali

attempted to deny this liability during trial, he failed to produce any documentary evidence demonstrating that these amounts had been paid to Koperasi Felda. Beyond making bare denials, Image Parking has not substantively challenged these admitted amounts.

[19] This was also admitted by Image Parking in their submission before this court. The submissions as reproduced as follows:

> 8. Seterusnya, Perayu/Plaintif juga mengakui keberhutangan kepada Responden untuk item berikut:
>
> (i) lebihan pendapatan bagi bulan Ogos 2019 berjumlah RM112,432.50
>
> (ii) lebihan pendapatan bagi bulan September 2019 berjumlah 7,013.87,
>
> (iii) sewa bulanan tetap bagi bulan September 2019 berjumlah RM70,000.00 kepada Responden/Defendan

[20] As for Koperasi Felda's other counterclaims for set off — specifically RM66,991.37 as set off No 1, RM61,325.37 as set off No 2, and RM5,666 for GST — these must be dismissed. The learned judge found that Koperasi Felda had failed to establish both the basis and quantum for these additional claims. As these are claims for special damages, they require specific proof which Koperasi Felda has not provided. We find no reason to disagree with the finding of the learned judge.

[21] Given that Image Parking conceded on the issue of the RM306,240 claim, Image Parking is required to pay Koperasi Felda the sum of RM189,446.37. There is no longer a need to set off.

[22] The remainder of the counterclaim is dismissed and the decision of the learned judge is affirmed.

APPEAL NO 1191

[23] Before us, Image Parking focused on two issues namely:

(a) the issue of loss of profits during the time when the car park bays were not licensed; and

(b) the issue of Image Parking being entitled to a return of the access payment made as a result of the shortfall of occupancy rates.

The issue of loss of profits during the time when the car park bays were not licenced

A **[24]** We found that the learned trial judge made several critical findings regarding the alleged loss of profits during periods when the mechanical parking bays lacked proper licensing. We find no reason to disturb these findings.

B **[25]** First, His Lordship found, based on compelling documentary evidence, that Image Parking actually collected revenues from the mechanical parking bays at RM212 per bay per month even during periods without valid licensing. This finding was supported by:

C (a) Image Parking's own circulars dated 9 September 2015 and 17 September 2015 establishing RM212 as the specific rate for mechanical bay parking;

(b) monthly collection records showing consistent collection of the RM212 rate; and

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(c) evidence that this collection continued both during and after the expiry of the one-year license period from 5 October 2015 to 10 November 2016.

E **[26]** His Lordship rightly rejected Image Parking's witness PW1's attempt to characterize the RM212 rate as being for normal bays beneath mechanical decks rather than the mechanical bays themselves. This rejection was well-founded given the documentary evidence clearly designating RM212 as the 'mechanical deck' rate.

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[27] Second, the learned trial judge correctly found no proof of actual loss of income due to the absence of licensing. The learned judge noted that:

(a) there was no evidence that all non-mechanical bays were fully occupied, necessitating use of mechanical bays;

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(b) no documentation showed vehicles being turned away due to inability to use mechanical bays; and

(c) no tenant complaints were produced regarding parking shortages due to mechanical bay issues.

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[28] Third, the learned judge properly held that even if loss of income had been proven (which it was not), Image Parking would only be entitled to 5% of such loss based on the profit-sharing formula in the contract, not the 100% claimed. This finding accurately reflects the clear terms of the agreement between the parties.

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[29] While the learned judge did award RM306,240 regarding the mechanical bays, this was explicitly based on a compromise agreement between

the parties rather than any proven loss during unlicensed periods. This distinction is important and was correctly drawn by the learned trial judge.

[30] Be that as it may, this has been overtaken by events as the concession by Image Parking on this sum had already been made.

[31] The totality of evidence amply supports His Lordship's conclusion that no compensable loss of profits occurred during the unlicensed periods.

[32] We find no error in either the reasoning or the conclusion reached on this issue.

The issue of image parking being entitled to a return of the access payment made as a result of the shortfall of occupancy rates

[33] Their main argument of claiming a refund amounting to RM1.26m being the sum due to them as the occupancy rates were below 80% during the contract period.

[34] Image Parking claims that the average occupancy rate for the five blocks of buildings remained between 50–70% during the period of 2013 to September 2019, falling below the 80% threshold specified in the contract.

[35] On this basis, Image Parking seeks a refund and readjustment of RM1.26m calculated at RM21,000 per month over 60 months, arguing that the rental payments should have been proportionately reduced to reflect the actual occupancy rates.

[36] Image Parking further contends that Koperasi Felda failed to provide requisite information on occupancy rates, thereby impeding their ability to properly assess and adjust the rental payments.

[37] To support their position, Image Parking relies on occupancy calculations performed by Henry Butcher, the property manager, which allocated equal weightage to office and retail spaces in determining overall occupancy rates. These contentions raise significant questions about the proper interpretation of the contractual provisions relating to occupancy rates and the corresponding obligations of both parties.

[38] We perused the grounds of judgment carefully to examine the basis of denying Image Parking's claim.

[39] The appeal centres on the interpretation of cll 1(b) and 1(c) of the letter of award dated 27 September 2012 and the method of computing occupancy rates.

The High Court analysis

[40] The learned judge meticulously analysed the contractual provisions regarding occupancy rates. The contract stipulated in cl 1(b) that 'the fixed rental payable shall be on a proportionate basis and in accordance to the physical occupancy of the complex and upon reaching 80% physical occupancy, full rental shall be payable accordingly'. Clause 1(c) further provided that if occupancy fell below 40%, the rental would be renegotiated.

[41] The learned judge found that while the contract required physical occupancy to be determined on the first day of each month, it did not define how physical occupancy rates were to be computed or who would determine it. This created a necessity to examine the proper method of computation.

Rejection of image parking's calculation method

[42] The learned judge rejected the calculation method employed by Image Parking through Henry Butcher's computation for several cogent reasons.

[43] First, the method gave equal weightage to office and retail units despite significant differences in their built-up areas and total numbers. The learned judge noted that Block E alone had office units averaging 57,000sqft each, while units in other blocks were only 1,000 to 1,500sqft.

[44] Second, the method failed to account for the disproportionate ratio between office and retail units. There were substantially more office units with higher occupancy rates (79–92%) compared to retail units with lower occupancy (45–65%).

[45] Third, and most critically, the learned judge found that computing occupancy rates by simply averaging the percentage of occupied office units with occupied retail units produced mathematically unsound results. The learned judge illustrated this through a hypothetical example where a 100 storey building with 99% occupied office floors and 0% occupied retail floor would yield an artificial 49.5% occupancy rate despite 99% of the total area being occupied.

Evidence of number of units as measure of occupancy

[46] The learned judge rejected Image Parking's unit-based calculation method after a thorough analysis. The learned judge found that for a car parking contract, physical occupancy must be assessed by total floor space occupied, not number of units, for three key reasons: first, the numbers of cars using parking bays depend on persons occupying the buildings; second, this occupancy is proportionate to built-up floor areas occupied; and third, where unit sizes vary significantly (as in Southgate), number of units is not a proper criterion for assessment.

[47] The specific problems with unit-based calculation at Southgate were particularly illuminating. The court noted that Block E office units were approximately 57,000sqft each — more than ten times larger than units in other blocks. The learned judge found it was 'incorrect and improper to give an office unit the same weightage as another office unit which is more than ten times its size.' This size disparity made unit counting fundamentally problematic for accurate occupancy assessment.

[48] The learned judge demonstrated the mathematical flaws through a detailed analysis of August 2016 data. Using Henry Butcher's unit count showed 239 occupied office units out of 261 and 56 occupied retail units out of 94, yielding a total of 295 occupied units out of 355, or 83% occupancy. Yet Henry Butcher reported only 76% occupancy due to their averaging method. This discrepancy conclusively demonstrated the unreliability of the unit-based approach.

[49] In place of the unit based methodology, the learned judge outlined that proper occupancy calculation must follow four essential steps: first, ascertain built-up areas of various units; second, calculate total built-up floor areas of all units; third, calculate total built-up floor areas of occupied units; and finally, apply the formula: (total floor area of occupied units ÷ total floor area of all units) x 100%.

[50] The learned judge's rejection of the unit-based calculation rested on three fundamental conclusions: it failed to account for significant size differences between units, it particularly undervalued Block E's contribution to occupancy given its substantially larger unit sizes, and most importantly, it was fundamentally unsuitable for determining actual physical occupancy for car park operation purposes.

Henry Butcher's evidence and monthly meetings

[51] The learned judge made significant observations regarding Henry Butcher's evidence. The court noted that both PW2 (Aqilah) and PW5 (Chen Woei Guang) admitted they had never seen the letter of award before the trial

A and were entirely unfamiliar with the terms of the Carpark Contract. Most notably, PW5 Chen initially conceded during examination on January 11, 2022, that Henry Butcher's computation of occupancy rates was unsuitable for car park contract purposes and could only be used for Joint Management Committee purposes. Though PW5 later attempted to affirm his colleague's B method when recalled as a witness, the learned judge found this to be 'an afterthought for saving the face of his company or to cover his colleague's error in computation'.

C **[52]** The learned judge scrutinised the reliability of Henry Butcher's data collection and computation methods. While accepting that their 'moving in' and 'moving out' records correctly documented the number of units occupied, the learned judge identified multiple fundamental flaws in their method of computing percentage occupancy, including:

D (a) taking block occupancy as a simple average of office and retail occupancy;

(b) taking overall occupancy as an average of the five blocks;

(c) failing to account for different unit sizes;

E (d) not considering the varying number of units per block; and

(e) ignoring the different total built-up floor areas in various blocks.

F **[53]** Regarding the monthly meetings and minutes, the learned judge specifically addressed Image Parking's attempt to use the absence of DW1's (Shahril Saiful) comments or disagreements to Henry Butcher's occupancy figures as evidence of acceptance. The learned judge rejected this argument for five distinct reasons:

G (a) the carpark contract contained no definition or criterion for measuring 'physical occupancy rates';

(b) the court accepted DW1's explanation that it was not for him to comment on Henry Butcher's figures at Joint Management Body meetings;

H (c) PW5 Chen had testified that Henry Butcher's figures were not suitable for carpark operations;

(d) the court found Henry Butcher's computation method erroneous and unreliable; and

I (e) the court determined Henry Butcher's methods were not suitable for the carpark contract purposes.

Finding of afterthought

[54] The learned judge's finding that the claim for overpayment was an afterthought was based on several compelling factors:

[55] Throughout 78 months of operations, Image Parking never raised the issue of occupancy rates or sought adjustments to rental payments. The first claim for alleged overpayment emerged only through a solicitor's letter dated 24 October 2019, after the contract's termination.

[56] The learned judge noted that as an experienced car park operator, if there was genuine concern about occupancy rates affecting rental obligations, Image Parking would likely have raised this during the contract period rather than after its conclusion.

[57] Furthermore, Image Parking's conduct in July 2017 of proposing to pay a fixed monthly amount of RM160,000 irrespective of revenue collections was inconsistent with having concerns about occupancy rates affecting rental obligations.

[58] We find no reason to disturb the factual analysis carried out by the trial court. The analysis was well reasoned and does not necessitate any appellate intervention.

OTHER ISSUES IN THE APPEAL

[59] Apart from the above issues raised by Image Parking in assailing Appeal 1191, we also find no reason to interfere on the other findings of the trial court. As mentioned above, the analysis by the court was comprehensive and had considered all factual evidence presented.

[60] We had invited submissions on the issue of who would be responsible for applying the certificate of fitness as mandated under s 19 of the Factories and Machinery Act 1967. It perhaps apposite to deal with this issue on the law.

[61] We take the position that Image Parking as a party given the exclusive right to the parking bays is the occupier of the parking area. There is sufficient evidence to suggest that they were the occupier of the said parking area of Block E. The control exercised by Image Parking is further amplified by the presence of their office on the said premises as well as other equipment such as CCTV cameras to monitor the parking areas.

[62] It is our firm view that Koperasi Felda is the owner of the premises. The facts are clear on this point. The original developer (Mah Sing Group) initially owned all the car parking bays in the development, as they were not included in the sales of commercial units to purchasers. The developer subsequently sold

A the car parking bays and Tower E block to Koperasi Felda.

[63] We also find Image Parking was the owner of the parking equipment. This can be seen from the undisputed fact of Image Parking's financing arrangements for the parking equipment and system. The carpark contract allowed Image Parking to receive from the monthly threshold net collection of RM110,000 an amount of RM40,000 per month, being the balance after the payment of the monthly fixed rental of RM70,000 to Koperasi Felda as from the second year of the contract onwards.

[64] In the first 60 months of the car park operation, Image Parking had to use its share of income to repay to the hire purchase company PAC Lease Bhd a monthly amount of RM17,819 for the purchase and installation of parking equipment and system in the Southgate Commercial Centre. The hire purchase of the said car park equipment and system were fully repaid at the end of month 60.

[65] Having considered the relevant provisions of the Factories and Machinery Act 1967 and the submissions made, we find as follows:

(a) the facts established before us are:

(i) Image Parking has been contracted to operate a parking facility in a building owned by Koperasi Felda;

(ii) the parking facility includes mechanically operated parking bays; and

(iii) Image Parking is the occupier while Koperasi Felda retains ownership of the premises.

(b) s 19(1) of the Act mandates that no person shall operate or permit the operation of any machinery requiring a certificate of fitness without a valid certificate. This provision must be read in conjunction with other relevant sections of the Act to determine the responsible party;

(c) the Act defines 'occupier' under s 3 as the person who occupies or uses the premises, while 'owner' is defined as the person receiving rents or profits from the premises or machinery. It is also provided that 'operator' includes any person employed on any service involving the management or operation of, or attendance on, any machinery;

(d) reg 10 of the Factories and Machinery (Notification, Certification of Fitness and Inspection) Regulations 1970 reads as follows:

(1) The owner of every steam boiler, unfired pressure vessel or hoisting machine other than a hoisting machine driven by manual power shall hold a

valid certificate of fitness in respect thereof so long as such machinery remains in service.

[66] It is our view that Koperasi Felda is the owner of the parking bays related to Block E. They are not owners of the equipment.

[67] We find that Image Parking, as the occupier, bears the primary responsibility for obtaining the certificate of fitness for the following reasons:

(a) s 21 explicitly places the duty of maintaining safety appliances and machinery on the occupier;

(b) the operational control and day-to-day management of the mechanical parking system lies with Image Parking as the contracted operator;

(c) s 50(1) establishes that the occupier is primarily liable for contraventions of the Act unless specifically provided otherwise;

(d) the Act's framework consistently assigns operational responsibilities to the occupier rather than the owner; and

(e) reg 10 of the Factories and Machinery (Notification, Certification of Fitness and Inspection) Regulations 1970 mandates the owner to hold a valid certificate of fitness.

[68] However, we also find that Koperasi Felda, as the owner of the parking bays, is not entirely absolved of responsibility. This is because under s 50(3), the owner may be held liable if the contravention occurred with their knowledge or consent. Similarly, s 40(3) imposes maintenance and safety obligations on both the occupier and owner.

[69] The relationship between Image Parking and Koperasi Felda in this context is analogous to that of a tenant and landlord, where the tenant bears primary responsibility for operational compliance while the landlord retains residual obligations.

[70] Based on the above findings, we determine that the primary responsibility for obtaining and maintaining the certificate of fitness under s 19 Act lies with Image Parking as the occupier. As the operator, Image Parking is also in a better position to answer to the authorities on the technical aspects of the equipment and would be able to provide information as and when an inspection is carried out.

[71] However, Koperasi Felda as the owner retains secondary liability under s 50(3) should they knowingly permit operation without proper certification.

A However, this is not an issue before the trial as there are no enforcement issues against any party at the trial court.

[72] Given the above finding, we do not find any reason to allow any reversal of the learned judge's finding on this issue. It does not alter the final outcome B of the appeal as it will not result an outcome favourable to the pleaded claim of the appellant.

NO APPELLATE INTERVENTION REQUIRED

C **[73]** We are of the view that the learned judge did not commit any appealable errors that merits appellate intervention. We are guided by the decision of the Federal Court decision in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67 where the Federal Court held that in applying the plainly wrong test, D a higher court can overturn a lower court's decision if it finds the lower court's factual findings to be demonstrably incorrect or unreasonable. This test essentially means that an appellate court will only interfere with a lower court's decision if it is so clearly wrong that no reasonable judge could have reached that conclusion based on the evidence presented.

E **[74]** Applying the 'plainly wrong' test, it is our view that the learned judge had properly considered all relevant evidence. He did not make any significant errors in interpreting the law,or reached a conclusion that is not supported by the facts on the record.

F

CONCLUSION

[75] We therefore find no reason to interfere with the findings of the learned judge. In the foregoing, we dismiss Image Parking's appeal in Appeal No 1191. G

Appeal No 1191 dismissed.

Reported by K Selvaraju

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